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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 70.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"

Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

I. Question Presented.

Respondents do not agree that the "question presented" is as stated by petitioner.

Petitioner asserts on page 2 of its brief that the "question presented" is whether or not "when an inert tow,

wholly under the direction and control of a towing vessel, is brought into collision with a third vessel and sunk *through negligence of the master of the tug*, . . . the owner of the tow [may] be held directly liable *in personam* to the owner of the third vessel for damage to the third vessel, *solely by reason of a contract between the owners of the tug and [of the] tow*, (to which the owner of the third vessel was a stranger) . . . ," which contract provided ". . . that all towing [thereunder] is done at the sole risk of the tow, that the owner of the tow will indemnify the owner of the tug for damages to third vessels and . . . [that] the master of the tug [is] to be the agent and servant of the owner of the tow." (Emphasis supplied.)

That language above quoted may phrase petitioner's concept of the "question presented" and to be decided here; but respondents contend that petitioner's liability to them is not necessarily or even primarily to be predicated upon any "negligence of the master of the tug": nor does such liability arise "solely by reason of a contract between the owners of the tug and [of the] tow"—at least to the extent that the contract should be determined as establishing legal rights and obligations, as between the tug and tow, from which respondents can obtain any *contractual* third-party benefit.

In order fully to portray our position on the question or questions presented on this appeal, it is desirable (if not indeed necessary) at the outset to analyze the reasoning adopted by both courts below.

The principal issue here is whether or not petitioner (as owner of the destroyer) was itself at fault for the collision and consequently liable *in personam* to respondents.

The *negligence* of petitioner upon which respondents rely is (as found by the District Judge) "that the lights on the

Destroyer were inadequate and insufficient at the time of the collision" and "that it was imprudent not to provide a crew on the Destroyer to attend to the lights and to see that they were kept brightly burning, and to have equipment for the sounding of fog signals to indicate the presence of the Destroyer in this unusually long flotilla." (R. 11.) The District Judge also found "that these faults contributed to the collision." (R. 11.) The District Judge then concluded (R. 12) "that in view of the contract between the Boston Company and Foundation Maritime, Ltd., above referred to, these faults with respect to lights and absence of crew must be *attributed directly to the owner of the Destroyer.*" (Emphasis supplied.) He restated that conclusion by saying (R. 12-13) "that the provisions *and subject matter* of the towage contract legally result in making the faults with respect to the lights and absence of crew on the Destroyer *directly attributable to the owner of the tow* . . ." (Emphasis supplied.) He then somewhat gratuitously added (R. 13) that "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company." His ultimate conclusion (R. 13, near bottom of page) was "(2) that the owner of the Destroyer *was at fault* with respect to lights and absence of crew; . . ." (Emphasis supplied.)

The District Judge was obviously basing his decision upon two lines of reasoning: (1) that because of the arrangements made, as disclosed by the contract, the "faults with respect to lights and absence of crew must be attributed directly to the owner of the Destroyer"; and (2) that even if "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug" the latter, "by the terms of the contract, became in this respect the servant of the Boston Company."

It is upon the correctness of the District Judge's first conclusion (twice stated) and the first line of reasoning above suggested that we primarily rely. His second conclusion, viz., that "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company," petitioner apparently considers to be the *only ratio decidendi* in the District Court, and in error.

The Court of Appeals evidently appreciated that the District Judge was basing his decision upon each of the two lines of reasoning suggested above, because it said (R. 58, top of page): "The District Judge held . . . that the *owner of the destroyer was at fault* in respect to lights and absence of crew on the destroyer, . . ." (Emphasis supplied.) It also said (R. 59): "The District Judge held that these conditions of the contract [after quoting paragraphs 2 and 3 of the Standard Towing Conditions] *legally resulted in making [these] faults . . . [of] the destroyer directly attributable to Boston Metals,* her owner, AND that these faults might be ascertained in the pending suit without being first litigated in a suit by the Winding Gulf against the tug, because they constituted faults of the master of the tug who, by the terms of the agreement, became in this respect the servant of Boston Metals." (Emphasis supplied.) The Court of Appeals went on to say (R. 61, top) that "*the record* [on that appeal] *supports the findings of Judge Chesnut that both vessels were at fault, for the reasons set out and discussed in his opinion;* and we conclude, as did Judge Coxe in the New York case,[1] that both vessels were at fault

[1] The Court of Appeals also said (R. 59, 60) that in *Adams v. The Peter Moran*, 94 Fed. Supp. 520 (the suit by these respondents against the tug which had the destroyer I-24 in tow), Judge Coxe held "that the provisions of the towing contract making the master of the tug the servant of the owner of the tow merely served

and that the damages should be divided." (Emphasis supplied.)

In addition to affirming the judgment in the District Court on the two grounds set out by Judge Chesnut, the Court of Appeals went on to add a third ground of its own, viz., that "the contract changed the settled rule that a tug is solely responsible for the fault of an inert tow of which it has entire charge" (R. 61); and thereafter it proceeded to speak almost exclusively in terms of the validity of the contract between petitioner and the tower, *qua* contract, and in language indicating that it regarded respondents as third party *contractual* beneficiaries.

However, near the end of its opinion the Court of Appeals reverted to the principle of simple tort liability, saying (R. 63, bottom; R. 64, top): "The contract was deliberately assumed and it would be unconscionable for the owner of the tow to repudiate it after the accident occurred." We believe the Court of Appeals intended those words to mean: "Responsibility for having the tow properly lighted and manned was, under the arrangement evidenced by the contract, deliberately assumed by the owner of the tow; and it would be unconscionable, after the accident occurred, for the owner of the tow to escape liability for the consequences of its negligence by striking down the contract, *qua* contract, as illegal."

With the foregoing in mind, respondents believe that the true question presented is this: When an unmanned tow, without motive power of her own, collides with a third vessel and becomes a total loss, and when the collision is caused in whole or in part by the failure of the tow to exhibit proper

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to fix the relationship between the tug and the Boston Metals, and could not affect *the liability of the tug or the liability of the tow, as independent vessels, each one liable to the collier for its own fault.*" (Emphasis supplied.)

lights at night and to have a crew on board, may the owner of the tow, who has arranged for the towage with the knowledge that the tower will not light or man the tow and who has himself made no provision that those things be done, be held directly liable *in personam* to the owner of the third vessel, wholly irrespective of concurrent faults on the part of the tug in those respects?

II. Statement of the Case.

Petitioner's "Statement of the Case," appearing on pages 2 through 7 of its brief, requires only two comments:

(1) In the first paragraph thereof (near the bottom of page 2) it is stated that the destroyer I-24 at the time "was an inert tow, unmanned and without motive power, wholly under the direction and control of the tug PETER MORAN." While the master and crew of the tug were the only persons *physically* controlling the movements of the tow at the time, petitioner knew as a fact that they would not man the tow or see that her lights were adequate. Proper lights were a navigational "must," and control of them remained with petitioner.

(2) On page 6 of petitioner's brief (in the paragraph commencing five lines from the bottom of that page) petitioner says that the District Court found that the collision resulted in part from negligence of the master of the tug, and that, "by imputing the fault of the master of the tug to the owner of the tow," the District Court held petitioner liable to respondents on their cross-libel. For reasons pointed out *supra*, that statement constitutes a narrow and in our view a secondary interpretation of the District Judge's opinion. The decision of the District Court (affirmed by the Court of Appeals) can be fully supported

without relying at all upon any imputing of fault of the master of the tug to the owner of the tow.

III. Summary of Argument.

On this phase of the litigation the only significance of the contract lies in its portrayal of the respective areas of responsibility in which the tower and petitioner (owner of the tow) would act during the towage operation. The contract shows unequivocally that the area in which the tower was to act did not include responsibility for the lighting and manning of the tow. That responsibility necessarily remained with petitioner; and since petitioner did not exercise any care whatever in those particulars, it is directly liable to respondents *in tort* for that negligence—wholly irrespective of any faults of the tower and its tug.

Accordingly, the question of *legal validity of the contract* as between petitioner and the tower is really of no significance here because respondents, in order to recover from petitioner, do not have to rely upon any "imputing" of faults of the tug to the owner of the tow by reason of the contract, *qua* contract.[2] If, however, despite the foregoing, this Court feels it necessary to determine that question in this case, the contract is valid.

Even upon petitioner's concept of the "Question Presented," and even if this Court should conclude that direct recovery by respondents against petitioner (on their cross-libel) should not be permitted, petitioner should, in any event, not be allowed any affirmative recovery against respondents in this litigation.

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[2] The *Bisso* case (No. 50) and the *Nielson* case (No. 210) present issues requiring a determination of the legal validity of the contracts respectively involved in those cases; and the general question of legal validity of a towage contract will be fully developed in the arguments (as it has been in the briefs) in those cases.

IV. Argument.

A. The True Significance of the Contract and the Correct Basis for Petitioner's Liability to Respondents.

In order for any court to determine issues of liability in this sort of case, it is necessary for the court to know the acts to be done by the tug and tow respectively, and particularly to know which of them has assumed responsibility for doing certain things.

For instance, in this very case, who (as between the tug and the tow) had the burden of exercising reasonable care to see that the tow exhibited proper and sufficient lights? That question can properly be answered only by looking at the arrangement which was made between them.

The District Judge properly and necessarily admitted the contract in evidence so that he could determine therefrom the arrangement which had been made and the resulting incidences of responsibility resting upon the tug and tow respectively. After doing so, he readily observed that this case does not involve a situation where a tug tows an unmanned vessel and undertakes *all* navigational responsibilities. On the contrary, the tower here was merely to provide towing motive power supplied by a tug (R. 21, 23) and to supply "the necessary personnel for handling the vessels [*i.e.*, the destroyers] through the Cape Cod Canal."[3] (R. 22.)

By the plain language used in the contract, the owner of the tow was to see that its tow was "in seaworthy condition" for the voyage (R. 22); and the tower said in effect to the owner of the tow: "I will take no action in any way

[3] Although Captain George of the tug PETER MORAN was on both destroyers while they were proceeding through the canal, it is clear that, after the destroyers were put on long hawsers in tandem off the western entrance to the canal and for the trip down Buzzards Bay and to Baltimore, both vessels in the tow were unmanned.

looking toward the proper lighting or manning of the tow, and I will not accept responsibility for any harm that may come, during the towage, either to the tow or to other property (including stranger vessels) by reason of any lack of adequate or sufficient lights on the tow or through any lack of crew. That is your responsibility!" [4]

On our theory of the case there is no need for any judicial determination here of the ultimate legal effect of the agreement exculpating the tug from liability, either directly or *via* the lent-servant or other agency theory. Likewise there is no need for any determination of the validity or effect of the provision in the contract that the owner of the tow will indemnify the tug and her owner from liability, including that resulting from damages inflicted upon third vessels.[5] The contract should be viewed for the sole purpose of determining those areas in which the tug and the tow respectively *in fact* assumed or retained responsibility. We have consistently contended in both courts below, and in our brief in opposition to the granting of the writ of certiorari in this case, that a recovery by respondents here does not have to be predicated upon faults of the tug imputed to the tow or upon any rights supposedly flowing to a third party from the con-

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[4] Petitioner, on page 22 of its brief, suggests that the owner of the tow was a landlubber corporation and perhaps did not realize what it should or should not do under the arrangement evidenced by the contract. That fact, even if true, affords no excuse. Everyone is in law presumed to know the import of an agreement into which he enters, whether it be in a field of business with which he is familiar or otherwise. Moreover, this suggestion by petitioner comes with little grace since petitioner had for some time prior to this occurrence been in the business of purchasing obsolete destroyers and other vessels wherever it could find them and then arranging for them to be towed to its metal scrapping plant at Baltimore. (District Court's Opinion on Damages, R. 43.)

[5] Those issues will presumably be adjudicated in a proceeding (if ever brought) between the tower and petitioner.

tract, *qua* contract; but rather can be grounded entirely upon *petitioner's own negligent failure* to see in some manner that the tow was properly lighted and manned, irrespective (in these proceedings) of any negligence of the tower.

In other words, if petitioner had arranged for this towing operation without anything in the agreement regarding the respective areas of activity to be exercised by the tug and the tow, it might then have relied upon the tower to take all necessary precautions. Here, however, petitioner, having reached a factual understanding with the tower that the latter need not take the necessary precautions, and having made no effort itself to do so or to see that those precautions were taken by others, is itself directly liable for harm caused by the precautions not having been taken by anybody.

On this aspect, petitioner is liable as a tort-feasor, singly or jointly, to respondents on either of two approaches: (1) Under the arrangement evidenced by the contract, petitioner became directly responsible for manning and lighting the tow, and the tow was not properly manned or adequately lighted. Cf. *Lake Superior Iron Co.* v. *Erickson*, 39 Mich. 492 (1878). (2) By specifically arranging for this towage with the understanding that the tower would not man or light the tow, petitioner was negligent and cannot escape responsibility for that negligence by arguing that the work arranged for was carried out by an independent contractor. Cf. *Collins* v. *Goodrich*, 324 Mass. 251, 85 N.E. (2d) 771 (1949). See also Note, 21 A.L.R. 1229 (1922), and Note, 30 A.L.R. 1502 (1924).

Moreover, the District Judge found that the tug and tow constituted an "unusually long flotilla" (R. 11), and he found by fair inference that "the towage of these two old and obsolete destroyers as a double tow for the long voyage from Sydney, Nova Scotia, to Baltimore, Maryland, . . .

was regarded as particularly hazardous . . ." (R. 12.) He ruled (R. 10) "that as the tow line was of unusual leng[t]h that fact imposed on the tug *and tow* the obligation to use great care to avoid accident." (Emphasis supplied.)

The rule was thus stated by the Supreme Court of Ohio in *Covington & Cincinnati Bridge Co.* v. *Steinbrock*, 61 Ohio St. 223, 55 N.E. 619, 76 Am. St. Rep. 375, as follows:

> "The weight of reason and authority is to the effect that where a party is under a duty to the public or third person to see that work he is about to do or have done is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another . . . It is the danger to others, incident to the performance of the work let to contract, that raises the duty and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

See *The W. D. Anderson*, 17 Fed. Supp. 754, 1937 A.M.C. 229 (E.D. Pa.), affirmed 94 F. (2d) 377, 1938 A.M.C. 288, cert. den. 58 S. Ct. 764, 303 U.S. 658; *Brady* v. *Jay*, 111 La. 1071, 36 So. 132 (1904); *Pendergrass* v. *Lovelace*, 57 New Mex. 661, 262 P. (2d) 231 (1953).[6]

Indeed, in cases where the work to be done by another is itself particularly or inherently hazardous, the employer (petitioner here) has a non-delegable duty to take necessary precautions to see that the doing of the work does not harm others; and some courts have said that the party

[6] For a collection of cases involving the liability of the employer where the work contracted for is particularly or inherently dangerous see 57 C.J.S. 362. See also Restatement of Torts, § 413 (vol. II, p. 1118), and § 416 (vol. II, p. 1128).

who otherwise might be an independent contractor then becomes the servant of the employer. This aspect may have been in Judge Chesnut's mind when he invoked his second line of reasoning on the ground of agency. See *Drennon* v. *Patton-Worsham Drug Co.*, 109 S.W. 218 (Texas Civ. Appeals, 1908).

Viewing the contract for the purposes above suggested, the result reached by the District Court, as announced by its final decree (R. 53-55), is sound. That decree was affirmed by the Court of Appeals. A correct result has been reached!

B. The Validity of the Contract.

On our theory of this case, a determination of the validity of the contract between the tower and petitioner, *qua* contract, is unnecessary here. That question will have to be decided only if the owner of the tug PETER MORAN should sue petitioner for reimbursement of any amount which that tug may be condemned (because of *her own faults*) to pay to these respondents in the suit which the latter have brought against that tug in the Southern District of New York.

Regardless of forum or parties, petitioner contends that the contract is invalid in law. It then argues that, because of such invalidity, the situation becomes that of an independent contractor tug, which has the tow wholly under its direction and control.[7] Petitioner thereupon concludes that the tug and tower alone are liable for any damages suffered by respondents.

Assuming *arguendo* that the contract *is* invalid, we have pointed out, *supra*, that the failure of petitioner properly to light or man the tow or to see that it was properly

[7] Even if the contract *is* invalid, the master-servant relationship is not thereby destroyed, since in fact both the tower and petitioner clearly understood such relationship to exist.

lighted or manned by others constitutes negligence of the petitioner itself, and that respondents may on their cross-libel recover directly against petitioner *in personam* their damages resulting from such negligence.

Without asserting that the validity of the contract, *qua* contract, is necessarily to be determined here, we submit that, if and when that question does come before a court in litigation between the parties to the contract, the contract should be declared valid.

In view of the foregoing, and unless this Court feels that it should sustain the judgment of the District Court solely on the latter's conclusion that "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company" (R. 13), and upon the third ground of decision invoked by the Court of Appeals, viz., that "liability of the owner of a tow to third parties may be based on such an agreement . . ." as constituting "a contract of indemnity . . ." (R. 63), the entire argument of petitioner on pages 9 through 27 of its brief strikes us as not germane to the actual issue, for two reasons: (1) it lies wholly outside the scope of *tort liability*, the principles whereof we feel primarily govern the decisions made and should govern the decision to be made by this Court; and (2) that argument is predicated almost entirely upon the assumption that the "tug had the *exclusive* control, direction and management of both vessels"[8] (emphasis supplied), which obviously the PETER MORAN did not have, for reasons pointed out above. Indeed, an analysis of most of the towage cases cited by petitioner shows that in each of those cases the tug was considered by the Court as having "exclusive control" and was therefore both factually and legally responsible for

[8] Language quoted in petitioner's brief, p. 15, from opinion of this Court in *Sturgis* v. *Boyer*, 24 How. (65 U.S.) 110, 122-123.

seeing that the tow exhibited proper lights and was properly manned.

In *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*,[9] cited in petitioner's brief, this Court had before it a "pilotage clause" situation, such as is now before it in the *Nielson* case (No. 210). The basic facts in such a situation are quite different from those in a case involving straight towage. Indeed, this Court expressly noted in the *Sun Oil Co.* case[10] that "the services covered by the contract were less than towage." Perhaps the holding in the *Sun Oil Co.* case might be limited to situations where the pilotage clause language in an agreement is strictly applicable.[11] We do not mean to imply that the result reached in the *Sun Oil Co.* case is not entirely correct, or that, when the question of lent servant is presented *in any case* between the parties to the agreement under which a servant is lent by one of them to the other, the effect of the temporary loan of such servant should not be in accord with the well-established rule in that sort of situation.

Certainly there is nothing in *Syracuse*[12] or *Wash Gray*[13] which compels the conclusion that this Court in either instance was announcing as a rule of public policy that a tower may not exonerate itself by contract from the negligence of its servants.

A towing vessel is clearly not a common carrier. As this Court said in *The Steamer Syracuse:*[14]

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[9] 287 U.S. 291; 1933 A.M.C. 35.

[10] 287 U.S. 291, 294; 1933 A.M.C. 35, 37.

[11] Such a limitation might tend to eliminate in the future the "confusion" in this general field which has been complained of by petitioner and by the Solicitor General in the *Bisso* and *Nielsen* cases.

[12] 12 Wall. (79 U.S.) 167.

[13] 277 U.S. 66; 1928 A.M.C. 923.

[14] 12 Wall. (79 U.S.) 167, 171.

". . . Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, . . ."

See also *The "Margaret,"* 94 U.S. 494, 496.

Consequently, a tower is not subject to the special limitations on freedom of contract which apply to common carriers. We know of no rule or reason why this contract, which so clearly expresses the intention that the tow should assume all liability (including that resulting—wholly or partly—from any negligence of the master and crew of the tug and excepting only liability for injury to the tug herself or her personnel), should be invalid. As this Court said in *Santa Fe, Prescott & Phœnix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U.S. 177 (a case where the railroad was not transporting as a common carrier), at p. 188:

"The parties then were free [absent common carriage] to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

The second sentence of the above-quoted language was quoted verbatim and with approval by this Court in the *Sun Oil Co.* case.[15]

[15] 287 U.S. 291, 294; 1933 A.M.C. 35, 37.

C. Even if Recovery by Respondents against Petitioner in Personam on the Cross-Libel is Improper, Petitioner should Not be Allowed Any Affirmative Recovery against Respondents.

We submit, for the reasons set forth *supra*, that the decisions below should be affirmed and that the case should not be remanded for the purpose of achieving a different result. If, despite our contentions, this Court should conclude that petitioner should not be subjected to liability *in personam* for its negligent failure to see that the destroyer exhibited adequate and sufficient lights and carried a crew, petitioner nevertheless should in no event obtain any affirmative recovery against respondents; and any instructions given by this Court which would result in a modification of the District Court's final decree should guard against such result.

After determining issues of liability on the basis of both WINDING GULF and petitioner at fault, the District Court heard the parties on the question of damages and found "that the fair value of the destroyer at the time of the loss and the consequent damages [suffered by petitioner] for her loss should be fixed at $15,000." (R. 52.) The District Court also found, as set forth in its opinion on damages (R. 46) and in its final decree (R. 54), that respondents, "owners of SS WINDING GULF at the time of the collision . . . sustained damages as a result of said collision in the amount of $18,657.04." Accordingly, respondents' damages exceed petitioner's damages by $3657.04.

If the destroyer had survived, respondents would have had a maritime collision lien against her as the offending *res*, and *she* would have been condemned in damages for *her* failure to exhibit proper lights and to carry a crew. This is so whether or not the tower was an independent

contractor for the reason that somebody must have the burden at any given time of using due diligence to see that a vessel traversing the seas during darkness is properly lighted. It does not matter who that "somebody" is or what the relationship between him and the vessel: if the person who has such burden fails to see that the vessel is properly lighted, the vessel *herself*, as the offending *res*, is at fault for that failure.

In *Standard Vacuum Transp. Co. v. City of New York*, 10 Fed. Supp. 341; 1935 A.M.C. 275 (S.D. N.Y.), a barge in tow of a tug (both commonly owned) collided with a City of New York ferry boat. Judge Patterson held the ferry at fault for failure to keep clear, and also held the barge and the tug each liable *in rem* for the absence of a light on the bow of the barge. He accordingly divided the damages into thirds. He said: "It makes no difference that the barge and the tug were owned by the same party, the libel being *in rem* against both barge and tug and the fault being viewed as that of the vessels themselves as separate offenders." The Second Circuit affirmed *per curiam*. 78 F. (2d) 536; 1935 A.M.C. 972.

In that case, despite the fact that the same party owned both barge and tug, *each* of those vessels was regarded as an *offending res*, compelled to pay her own share of the damages. In this case the destroyer was similarly an offending *res* because she should have carried proper lights supplied by somebody, whether her failure to exhibit proper lights was due to the negligence of her owner, the negligence of the tower (whether or not an independent contractor), or the negligence of both.

In admiralty (as stated by Mr. Justice Story in *Sheppard v. Taylor*) ". . . there is no difference between the case of a restitution in specie of the ship itself, and a restitution in value. The lien [for seamen's wages] reattaches

to the thing and to whatever is substituted for it." [16] This Court later said in *O'Brien* v. *Miller:* "Indeed, that a right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself, was decided in this court in the case of *Sheppard* v. *Taylor* . . ." [17]

That principle has recently been applied in *Davis* v. *The Esso Delivery No. 13.*[18] There a tanker barge collided with an anchored motor boat. The former was undamaged: the latter sank and became a total loss. The latter's owner had nothing to do with her management at the time. Certain guests on the motor boat were injured and sued the tanker barge. On the collision liability aspect, both vessels were found at fault. The owner of the tanker barge then raised the question whether or not it could set off against its liability to the owner of the motor boat the amount of the recoveries against it by those on the motor boat. Judge Coleman concluded that such a set-off was proper, and assigned as his first ground for reaching that result that "it is well established that in admiralty a sum awarded as the value of a vessel is the res that is substituted for the vessel." [19] He went on to say that the "gist of the holding" in *In Re United States Steel Products Co.*[20] "is clearly this: Where one vessel is lost in a mutual fault collision, any claims that could validly be asserted against such vessel may be asserted against any award made to, and in substitution for, that vessel herself." [21]

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[16] 5 Pet. (30 U.S.) 675 (674), 710.

[17] 168 U.S. 287, 305.

[18] 100 Fed. Supp. 285; 1951 A.M.C. 1405 (D.C. Md.)

[19] 100 Fed. Supp. 285, 289; 1951 A.M.C. 1405, 1411.

[20] 24 F. (2d) 657; 1928 A.M.C. 513.

[21] 100 Fed. Supp. 285, 290; 1951 A.M.C. 1405, 1412.

The amount of petitioner's recovery here will be the substituted *res* for the destroyer, and respondents' claim (which could validly have been asserted against the destroyer had she survived) can be asserted against the award of damages to petitioner in substitution for that vessel. Consequently, respondents can set off their liability to petitioner against petitioner's liability to them; and, the balance being in respondents' favor, petitioner is precluded in any event from making any affirmative recovery against respondents in this litigation.

We concede that this aspect of the matter is not closely related to the issues over which this Court has taken jurisdiction; but it is nevertheless a feature which this Court should have in mind if it should decide, contrary to our contentions, to remand this case with instructions as to a further and different adjudication below.

V. Conclusion.

The final decree of the District Court, affirmed by the Court of Appeals, should be affirmed by this Court, and respondents should be awarded their costs on this appeal.

Respectfully submitted,

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